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Where Have All The Learned Treatises Gone?

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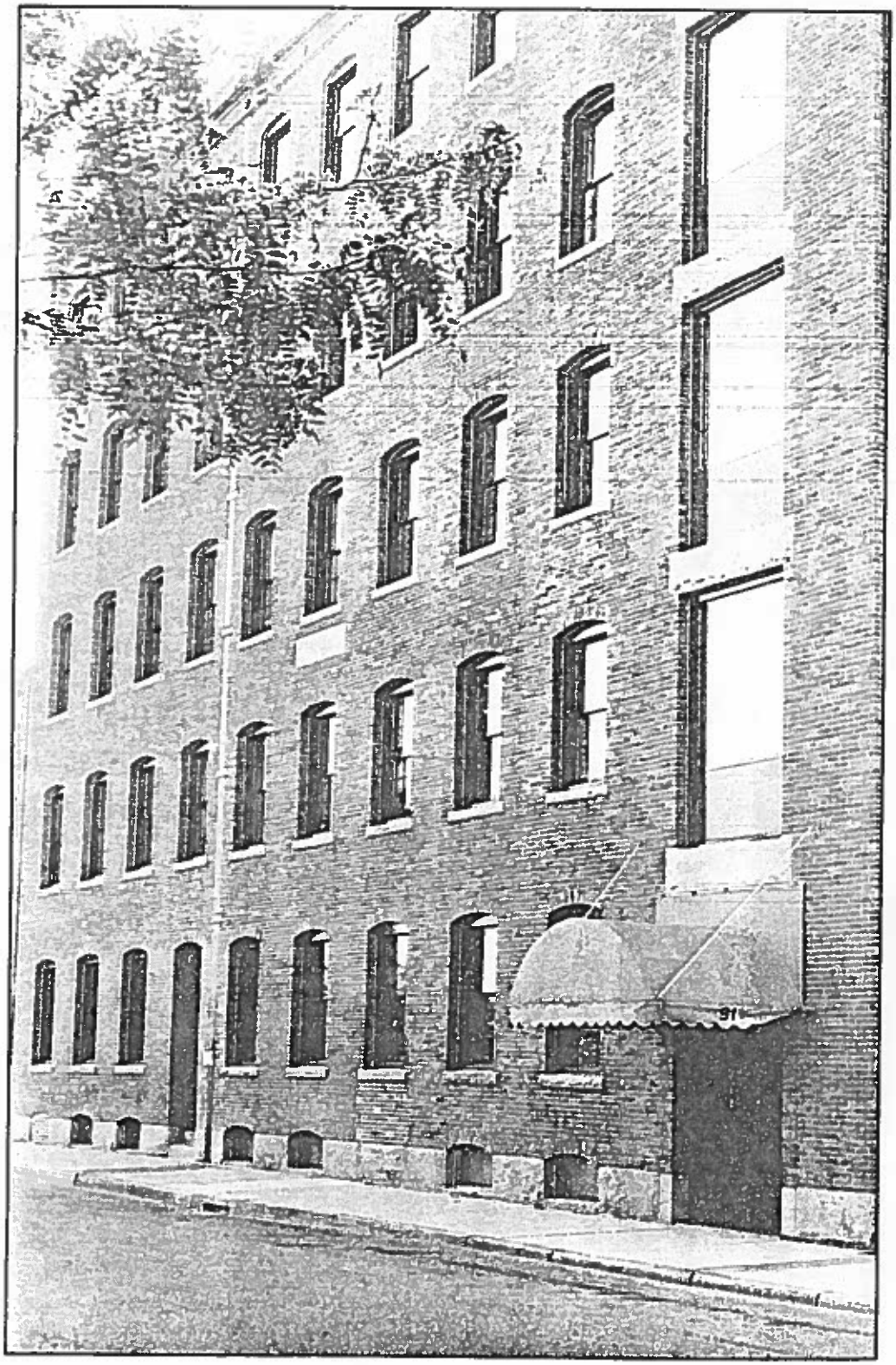

Harborlines, Underwater Lots, and Coastal Development

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Abstract

The evolution of the concept of harborlines is discussed along with their current legal status. Recent efforts towards integrated harbor management, particularly in Rhode Island and Connecticut, are examined.

1. Introduction

One of the most challenging legal problems in coastal zone management today involves the conflict between 19th century development-oriented case law and contemporary programs and regulations which attempt to balance private development rights with public rights in coastal resources. This is particularly true in the Northeastern United States, where a strong tradition of private ownership and concomitant development rights has existed since the colonial era. Efforts to balance those rights with the public trust concept inevitably lead to protracted conflicts.

The biggest single problem has been the use of harborlines, developed by the U.S. Army Corps of Engineers under the authority of the Rivers and Harbors Act of 1899 (33 U.S.C. 404). Originally intended as a device to protect navigation from unregulated wharf and pier construction, these lines ultimately came to define the outer limit of a coastal property owner's riparian rights. Filling out to the harborline became a matter of right.

Further complicating the property issue is the existence of so-called underwater lots, platted and sold before the Army Corps became involved in harbor regulation. Communities promoted the sale of underwater lots to encourage wharf construction in underimproved harbors. Their continued existence is perplexing to coastal managers and the source of additional conflicts.

The most recent effort to reconcile all of these issues involved a coordinated management and planning approach. Both Connecticut and Rhode Island are actively involved in the harbor management process, which may ultimately lead to a decentralized decision-making framework with the goal of reconciling old property rights with the new and varied demands placed on harbor use.

2. History & Law

The evolution of the law of harbor management is best understood through an analysis of the historical development of port and harbor use. For the purposes of this paper, three distinct periods will be discussed:

(1) Colonial Era
(2) Industrial Age
(3) Present

Examples to illustrate these periods will be drawn primarily from Rhode Island history and law, but they are generally representative of conditions found elsewhere in the Northeastern United States.

In the Colonial Era, one of the most pressing concerns of the early colonists was the development of adequate port facilities to engage in trade with Europe. Hindered by the lack of piers and wharves, early policy promoted wharf construction. Grants of land were often made to developers who would build a wharf that would serve the common good. The ownership of submerged lands remained with the sovereign, but subject to certain public rights. This type of ownership is best described by the two Latin phrases **jus privatum** and **jus publicum.**[1] The sovereign could only convey his **jus privatum,** or private ownership interest, in submerged lands. The **jus publicum,** or rights of the public for navigation and fishing could not be conveyed by the king and were held in trust for all of the people. Only Parliament, as the public's representative, could convey the **jus publicum.** After independence, the rights to transfer both **jus privatum** and **publicum** passed to the individual state legislatures. In 1789, with the adoption of the U.S. Constitution, the states surrendered some of their power over tidelands as the result of the commerce clause and the recognition of federal admiralty jurisdiction.

In Newport, Rhode Island, the subject of wharf construction is first mentioned in the records of a town meeting held April 29, 1685. At that meeting of the freemen of Newport it was ordered that Benedict Arnold and others "hath liberty granted them to build a wharf into ye sea."[2] In 1707, the colonial general assembly passed a statute regarding harbors and wharf construction which continues to have impact today:

> that each town in the colony now established, or that hereafter may be established, may be, and have hereby granted unto them full power and authority to settle such covers, creeks, rivers, waters, banks bordering upon the respective townships as they shall think fit, for the promoting their several towns and townships by building houses and warehouses, wharves, laying out lots, or any other improvements, . . . for the promoting of trade and navigation.[3]

Newport established a committee of freemen in 1711 to "lay out said cover into such and so many lots as they shall think most proper."[4] These lots were ultimately platted in 1757 and still exist today. Several of those lots were and are underwater but lie shoreward of the recognized harborlines of New-

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port Harbor. They played a pivotal role in the Long Wharf development case to be discussed later in this paper.

Development of wharves and piers in Newport continued as the importance of the port in colonial New England grew. It was assumed that the owner of any land bordering the harbor had the right to wharf out as long as "he did no injury whatever to the public."[5] The difficulty, readily apparent by the mid 19th century, was in determining what exactly was "injurious to the public." Wharves were becoming longer, closer together, and the public part of the harbor was as a result becoming increasingly constricted.

The crisis of overcrowding at the start of the second period, the Industrial Age, created the need for some type of public regulation of harbor development. In 1873, the Rhode Island General Assembly passed the Harborline Act, which introduced the concept to all Rhode Island waters after several earlier attempts at drawing lines in the port of Providence.[6] In 1877, the General Assembly passed the Harbor Commissioners Act, which interdicted further erections or encroachments in the tide waters of the state except as authorized by the Harbor Commissioners or the general Assembly.[7]

Just two years after the passage of the original Harborline Act, wharf owners in Newport went to court in an effort to clarify their rights. The Rhode Island Supreme Court provided this definition of a harborline:

> It marks the boundary of a certain part of the public waters which is reserved for a harbor. The part so reserved is to be protected from encroachment. The rest is left to be filled and occupied by the riparian proprietors. Its establishment is equivalent to a legislative declaration that navigation will not be straightened or obstructed by any such filling out.[8]

With such a clear definition of the riparian owner's rights, development continued at a significant pace. Harborlines were established throughout Narragansett Bay, and development out to them proceeded under what was virtually a blanket permit system. The only limitation placed on the location of the harborlines was that navigation would not be unduly adversely affected. This statutory "right to fill" caused a substantial alteration of Rhode Island's harbors. If develop-

ment beyond the harborlines was sought, the lines could be (and often were) changed by the General Assembly. This common law right to wharf out was expressed as recently as 1960 by the Rhode Island Supreme Court in **Nugent v Vallone:**

> Indeed it appears to have been long recognized in this state that this right to wharf out is a common law right which, in the absence of statute to the contrary, will not be denied, provided that the exercise thereof does not interfere with navigation or the rights of other riparian proprietors.[9]

The federal government finally became involved in the harborline issue in 1899 in an effort to achieve some uniformity among the states and to preserve the paramount right of navigation. Section II of the Rivers and Harbor Act of 1899 (33 U.S.C. 404) authorizes the Secretary of the Army to establish harborlines where essential to the preservation and protection of harbors, beyond which no piers, wharfs, bulkheads or other works shall be extended or deposits made; except under regulations prescribed by him. With the establishment of federal harbor lines, the stage was set for a conflict between the federal and state governments over their location. In **Philadelphia Co. v Stimson,** the U.S. Supreme Court was called upon to resolve a dispute between the state of Pennsylvania and the Secretary of War over the location of harborlines drawn around an island in the Ohio River near Pittsburgh. The court held that when Pennsylvania established harborlines, its action, however effective as between the state and riparian owners, was necessarily subject to the paramount power of Congress. The action by the Secretary of War was not a 5th Amendment "taking" since title to submerged soil is always subject to the federal navigation servitude. The Secretary was allowed to establish harborlines and later change them in order to more fully protect the rivers from obstruction.[10]

In the case of **Port of Seattle v Oregon & W.R. Co.,** the U.S. Supreme Court considered whether the federal harborline could confer property rights under state law. In that case, the railroad argued that along with title to filled land, they acquired riparian rights to construct piers to the 125' "pierhead" or harborline. This

was contrary to Article 15 of the State of Washington's Constitution which clearly expresses a policy not to grant riparian rights in navigable waters. The court held that whether conveyance of "fast" or filled lands includes riparian rights is a matter of local law — which in the case of Washington meant that no rights could be granted beyond the high water mark.[11]

Until the Army Corps of Engineers changed its policy in 1970, riparian owners could construct open pile structures, or undertake solid fill construction shoreward of established harborlines without obtaining a federal permit. States generally required permits, but normally followed the common law rule that wharfing out was a riparian right which should be allowed unless there was a negative navigation impact. By definition, anything within the harborline did not have a negative impact on public navigation rights. Thus the Industrial Age period can be distinguished from the earlier Colonial Era on several grounds:

(1) Unlike the undeveloped harbors of the Colonial Era, harbors in the Industrial Age had become progressively more congested, and
(2) an artificial limit, the harborline, was created by both state and federal governments to limit the common law riparian right to wharf out.

However, the two periods were quite similar in one respect: the only public right that was recognized was the navigation servitude.

The year 1970 was a watershed year for the environment in the United States. A substantial part of our nation's federal statutory environmental law was added in the 1970-1972 period. Directly related to this paper was a major change in policy by the Army Corps of Engineers announced on May 26, 1970 as amendments to the rules applying 33 U.S.C. 403. The Corps recognized that under previous policies, riparian owners could construct open pile structures or solid fill construction shoreward of established harborlines without obtaining a permit under 33 U.S.C. 403. They found that this created the risk that construction could be undertaken without appropriate consideration having been given to the impact which such work may have on the environment and without a judgment having been made whether the work was, on balance, in the public interest. In order to protect the public interest in the future, all existing and future harborlines were declared to be guidelines for defining, with respect to the impact on navigation done, the offshore limits of piers or wharves.[12] The concept of what is involved in the "public interest review" was further clarified with additional rules in 1982. In particular, any decision on a federal permit must be consistent with the coastal zone management program of the state in question if it has an approved program.[13]

That decision of the Corp in 1970, coupled with the Coastal Zone Management Act of 1972,[14] brings us to the modern era of regulating harbor development. The modern era is characterized by active harbor management efforts, considering a broad range of impacts presented by any harbor development. States with approved coastal management programs have the ability to plan ahead and mitigate the inevitable multiple use conflicts.

Occasionally, however, the combination of old law and new uses presents a perplexing problem for coastal managers. On April 21, 1982, the Long Wharf Development Company proposed the construction of a five story time-sharing hotel in Newport, Rhode Island. The unique aspect of the proposal was that the developers proposed to extend the hotel about 68 feet over Newport Harbor on pilings

sunk into four submerged lots, platted and taxed since the 18th century, and now owned by the Long Wharf Company.[15] The proposal was heard by the Rhode Island Coastal Resources Management Council, which has jurisdiction over all shore-front construction.

There were several interesting aspects to this case. Actual ownership of the underwater lots was not explicitly challenged, but the right to develop them, especially for a non-water dependent use, was hotly contested by local residents and ultimately the City Council. The city claimed that the right to wharf out from the dry land property and to build on the submerged lots was subject to the public trust doctrine, a derivation of the **jus publicum** discussed earlier. The city argued that the public's right to use Newport Harbor for recreational boating and fishing would be adversely affected by the hotel.

Despite all of the discussion about the decreased importance of harbor-lines in contemporary coastal management, the developer repeatedly emphasized that the hotel would not extend beyond the Newport harbor-line. There was a strong attempt to utilize the case law from the 19th century Industrial Age to support the right to develop lots platted in the 18th century Colonial Era.

Ultimately, the proposal was withdrawn after a strong objection by the Newport City Council and a compromise allowed the developer to move the hotel landward. However, the case did raise the fascinating question of the role of the public trust and evolving shoreline uses. The Massachusetts Supreme Court stated the question very well in the celebrated *Boston Waterfront Development* case:

> At that time, it was probably inconceivable to men who sat on the legislature or on the bench that the harbor would ever cease to be used for commercial shipping, or that a wharf might be more profitable as a foundation for private condominiums and pleasure boats than as a facility serving public needs of commerce and trade. They did not speculate on what should become of the land granted to private proprietors to further development of maritime commerce if that very commerce should cease, because they did not envision it.[16]

Older urban ports are facing the same problems on a daily basis as new uses are sought for aging terminal facilities, displaced by new trade patterns and the shift to container transport. Is the "commerce" represented by a hotel enough of a public benefit to justify the loss of public recreational resources? For commercial harbors that are now largely used by recreational boaters, how can the competing uses be balanced?

3. Harbor Management

The most recent attempt to answer the questions just raised involves active management of a harbor area. Called "Special Area Management" in Rhode Island, and simply "Harbor Management" in Connecticut, the effort is to go much further than simply responding to permit applications on a case-by-case basis.

In Rhode Island, the first harbor to receive special attention was the port of Providence. A multi-year study, coordinated by the Rhode Island Coastal Resources management Program, has developed a plan which attempts to alleviate the problems presented in a classic older urban port. Five major goals are cited. First, as redevelopment of the port proceeds, an effort will be made to maintain a balance among port, recreation, commercial and residential uses. Second, an effort will be made to improve the water quality of the port area so that recreational use of the waters is once again possible. Third, port development will be encouraged to more fully utilize the dedicated industrial waterfront area and alleviate the shoreline debris problem created by outdated and abandoned facilities. Fourth, recreation and public access

to the harbor area can and should be increased since the port is adjacent to Rhode Island's most densely populated urban area. Finally, the Council appointed a permanent subcommitte on Urban ports and Harbor to assure that public and private decisions and actions affecting Providence Harbor meet the policies of the special area plan.[17]

To its credit, the plan is the first coordinated approach to a complex management problem. Whether it can have a positive impact on the Balkanixed world of Rhode Island coastal politics remains to be seen.

A similar approach was recently undertaken for Newport Harbor. Development in and around Newport Harbor has proceeded at a dizzying pace for nearly the last decade. Much of the Harbor's visual appeal has been lost in the rush to ring its crush of visiting recreational boats recently led to the passage of a stringent new set of rules and regulations for vessels in the harbor.[18] Divided into some twenty-two sections, it controls everything from mooring tackle specifications to seaplane landing areas. The stated purpose of the regulations is to standardize mooring practices so as to utilize the limited area in Newport Harbor to the maximum while implementing uniform safety practices. It is interesting to note that the four publicly owned city piers, developed for commercial vessels of a bygone area, are reserved for recreational purposes. Any use by watercraft others than dinghies is prohibited.

Connecticut has taken an even more dramatic step with the passage of Public Act No. 84-247, "An Act Concerning Harbor Management", in May, 1984. The new law will come into effect in October, 1984. The law permits, and in fact encourages, municipalities to establish "harbor management commissions" with jurisdiction over the navigable waters within the territorial limits of the municipality. As in the Rhode Island example, the commission is charged with the development of a plan "for the most desirable use of the harbor for recreational, commercial, industrial, and other purposes." The approval process, however, is more complex. The plan must be approved by both the Commissioners of Environmental Protection and Transportation and then may be adopted by ordinance by the legislative body of the municipality establishing the commission. A copy of the plan must also be forwarded to the Army Corps of Engineers for review, comments, and recommendations.

The statute requires that the plan include provisions for the orderly, safe and efficient allocation of the harbor for boating by establishing:

(1) the location and distribution of seasonal moorings and anchorages,
(2) unobstructed access to and around federal navigation channels, and
(3) space for moorings and anchorages for transient vessels.

In preparing the plan, the commission is supposed to consider the following factors:

(1) recreational and commercial boating;
(2) recreational and commercial fisheries and shellfisheries;
(3) fish and shellfish resources, including leased shellfish beds;
(4) conservation of natural resources; for boating by establishing:
(5) areas subject to high velocity waters;
(6) exposed areas subject to flooding;
(7) water dependent commercial and industrial uses;
(8) water quality and public health;
(9) recreational uses other than boating or fisheries;
(10) water dependent educational uses;
(11) public access; and
(12) tidal wetlands and intertidal flats.

Nothing in the statute indicates

whether one factor is to be given more weight than another. Since there are some obvious internal conflicts among the factors (e.g. a water-dependent industrial use discharging into a leased shellfish bed) it is apparent that each municipality will have to set its own priorities. A commission in New Haven, for example, is more likely to favor industrial uses than one in Noank. That flexibility may be one of the statute's strengths.

In addition to its own powers, the commission also has review authority over other bodies acting on any proposal affecting the real property on, in or contiguous to the harbor. A two-thirds vote of all the members of the local agency having authority to act on the proposal shall be required to approve a proposal which has not received a favorable recommendation from the harbor commission.

The commission also has the power to strictly control moorings and charge a maximum annual fee of one hundred dollars which is to be used for the maintenance of the harbor and expenses related to the function of the commission and the harbor master. In that respect it is quite similar to the Newport Harbor rules outlined above.

Perhaps the most significant part of the statute, at least in the context of this paper, is that upon adoption of the plan the commission may request a general permit from the Army Corps of Engineers and delegation to enforcement authority. The Corps supports the new law, and for obvious good reason: when the administrative rule changed in 1970, they became involved in local development problems within navigable waters. Their involvement was predicated on the fact that local and state governments had not been doing an adequate job of managing their coastal resources. However, if management can be handled responsibly by a local commission operating under a Corps-approved plan, the need for federal supervision is obviated.

Will the Connecticut approach work? It's very difficult to tell. The Commissioner of Environmental Protection has until April, 1985, to develop a "model harbor management plan." The model will have to be a good one to convince several communities: both Milford and Norwalk have been trying for several years to develop harbor management plans. The Milford plan, according to local task force member Alan Berrien, "will be completed soon — probably within the next 50 years."[19] Whenever the task force met in public, "the issues exploded." The new state law may provide some impetus to begin discussions again, but the issues involved have not gotten any simpler.

4. Conclusions

Harbor law has directly followed the history of harbor usage in this country. Colonial statutes were promotional in nature, and encouraged private investment for the public good of providing wharf facilities. As harbors became more crowded in the Industrial Age, the concept of harborlines was developed to protect the public navigational servitude. Finally, the concept of the "public interest review" was developed by the Army Corps of Engineers in recognition of a greater awareness of coastal resources evident in the passage of the Coastal Zone Management Act of 1972. Harbor management goes beyond the simple regulation of harbor activities and actively promotes the uses the local community, with state and federal approval, see as appropriate for waters under their jurisdiction. The management system has grown more complex, but so have the uses our harbors must accommodate.

5. Notes

1. See generally Rosen, M., "Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction," 34 *Univ. of Florida Law Review* 561, (1982)
2. Newport Town Records
3. Angell, *Treatise on the Right of Property in Tidewaters and in the Soil and Shores Thereof* (1847) p. 237.
4. Newport Town Records.
5. Angell, **supra** note 3 at 236
6. **Engs v Peckham**, 11 RI 210, 212 (1875)
7. Public Laws cap. 611, Sec. 5, (1877)
8. **supra** note 6 at 233
9. 91 R.I. 145 (1960)
10. 223 U.S. 605, 32 S. Ct. 340 (1911)
11. 255 U.S. 56, 41 S. Ct. 237, (1921)
12. 33 CFR 209.150, *Federal Register*, Vol. 35, No. 103, p. 8280 (May 27, 1970)
13. 33 CFR 320.4 (o), *Federal Register*, Vol. 47, No. 141, p. 31806 (July 22, 1982)
14. 16 U.S.C. 1451.
15. "Councilmen Object to Over-Water Hotel," *Newport Daily News*, (Nov. 8, 1982) p. 2.
16. **Boston Waterfront Development Corp. v Commonwealth**, 393 N.E. 2d 356, (S. Ct. Mass. 1979).
17. Coastal Resources Management Council, *Providence Harbor — A Special Area Management Plan*, (1983).
18. Mooring and Anchorage Rules and Regulations for Newport, Rhode Island Harbor, Chapter 234, City Code.
19. "Harbor Troubles Discussed at Meeting," *The Day*, New London, Conn., (April 12, 1984) p. 16.